SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

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No. 474

LESLIE D. BLOOM and IDA DUBOSE, Guardians of Flora Alward Rohnert (T. J. Coenen, Curator for the Absent Heirs of Flora Alward Rohnert, Deceased).

Petitioners,

versus

JOHN W. WILLIS, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Louisiana.

BRIEF OF RESPONDENTS IN OPPOSITION TO ALLOWANCE OF THE WRIT.

GEO. GUNBY,
M. C. THOMPSON,
M. McVEA OLIVER,
Monroe, Louisiana;
WARREN L. HUNT,
W. D. COTTON,
Rayville, Louisiana;
A. K. GOFF,
Ruston, Louisiana;
E. GORDON WEST,
Baton Rouge, Louisiana;
WM. H. BRONSON,
Shreveport, Louisiana;
Attorneys for Respondents.

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BRIEF OF RESPONDENTS IN OPPOSITION TO ALLOWANCE OF THE WRIT.

May It Please the Court:

OPINION BELOW.

The opinion and decree of the Supreme Court of Louisiana which is herein sought to be reviewed is reported at *221 La. 893, 60 So. (2d) 415*, and appears in the Record at page 104.

JURISDICTION.

The opinion and decree was rendered June 2, 1952. The motion of appellants (petitioners herein) for rehearing was denied July 3, 1952 (R. 122). Upon motion to this Court a delay was granted to petitioners to apply for writ of certiorari until November 30, 1952. A printed application for certiorari was served upon respondents' counsel November 30, 1952. Upon further motion by petitioners the time for making service under Rule 38, paragraph 3, was extended to and including January 19, 1953, and service of the printed record was made on respondents' counsel January 23, 1953. Jurisdiction of this Court was invoked in the application under *28 U. S. C. 1257(3)*.

QUESTION PRESENTED.

The parties plaintiff in the District Court of Richland Parish, Louisiana, (appellants in the Louisiana Supreme Court and petitioners here) asserted title to certain lands in that State and as basis thereof alleged a marriage between one Flora Alward and Frederick Rohnert (deceased in 1936) in Detroit, Michigan, in, or about, or prior to the year of 1893. From an adverse decision, rejecting their demands, plaintiffs prosecuted an appeal to the Supreme Court of Louisiana and, pending a hearing and determination of that appeal, appellants filed motions to remand for further trial on the question of marriage, *vel non*, to which motions were attached several affidavits from parties who had not testified at the trial, but asserted some knowledge of the marital relations of the parties, and an unauthenticated statement in a purported letter, said to have been signed by one Richard L. Sims, who was a witness at the trial to certain matters unrelated

to the asserted marriage, that he thought he had information of importance to plaintiffs' case, but such information was undisclosed by such letter and the motion to which it was attached.

Whether failure of the Supreme Court of Louisiana to remand the case for further evidence, consideration, and decision constituted a denial of due process of law to petitioners under the *Fourteenth Amendment to the United States Constitution* is the only question presented in the petition for certiorari.

STATUTE INVOLVED.

Seemingly, the only state statute which may be involved is *Article 906 of the Code of Practice of Louisiana*, which provides:

> "But if the court shall think it not possible to pronounce definitely on the cause, in the state in which it is, either because the parties have failed to adduce the necessary testimony, or because the inferior court refuse to receive it, or otherwise, it may, according to circumstances, remand the cause to the lower court, with instructions as to the testimony which it shall receive, to the end that it may decide according to law."

STATEMENT OF THE CASE.

Although some defenses were pleaded and urged relating to other matters, the primary question presented in this case and the only question passed on by the trial and appellate courts of the State of Louisiana related to whether or not a marriage had been entered into which

would be recognized by the laws and the courts of Louisiana. The record discloses that several volumes of testimony and other evidence were adduced on this question, which were considered by both trial and appellate courts in reaching their decisions. With respect to the motions of appellants to remand and the affidavit and letter exhibits annexed thereto, the Supreme Court of Louisiana said and held *(60 So. (2d) 420)*:

> "Plaintiffs, in the alternative, have moved in writing here that the cases be remanded to the district court for the purpose of permitting all parties litigant to introduce additional evidence relating to the alleged marriage, and they have attached to the motions numerous affidavits and some letters of suggested witnesses in which the substance of the proposed new testimony is recited. From the record we find that plaintiffs' counsel were engaged in this litigation for more than two years in advance of the trial, and, this being true, there appears to be no good reason why the new evidence now sought to be introduced could not have been obtained during that period. But conceding arguendo that counsel used all due diligence in attempting to locate it, the greater part of the asserted newly discovered evidence relates to the above described activities of Flora Alward and Rohnert during their acquaintance and association at the drug store; **it, in the main, is purely cumulative; and, if introduced, it could not change the result herein reached.** The alternative motions to remand, therefore, are overruled." (Emphasis ours).

The witness, Richard L. Sims, testified at the trial of the case respecting matters unrelated to the alleged marriage. He was not questioned on either direct or cross-examination as to the marriage. (R. 45-52). The witness was born and lived in Delhi, Louisiana. He was 53 years old when he testified in September, 1950, (R. 47) and was therefore not born until 1897 and could have had no knowledge of a marriage said to have been contracted in or before 1893, when it is alleged that Flora Alward and Frederick Rohnert were married and subsequently resided in Detroit, Michigan. It is not indicated in the letter of Sims to the attorney for appellants (petitioners here), nor in the accompanying motion to remand, that Sims had any knowledge whatever respecting the alleged marriage or that he could give any testimony relating thereto. (R. 94-101). In the letter reply of the attorney for appellants (petitioners here) to Sims (R. 100) it was said: "In the absence of a statement from you or an interview revealing exactly what the facts are as you know them, I am not in a position to say whether or not the information would be of any benefit to me."

Notwithstanding suggestion is made in their petition for the writ that the witness Sims was bribed and that one of the attorneys for respondents was *particeps criminis* or, at least, guilty of improper conduct with respect thereto, it is said parenthetically and in bold face type at page 12 of the printed Motion for Enlargement of Time, etc., that there was no intendment at any time to

question the integrity and ethics of any one of the opposing counsel.

The assertion of rights under the *Fourteenth Amendment* was first made in application for rehearing in the Supreme Court of Louisiana. No reference was made thereto in denying the rehearing. (R. 122).

ARGUMENT.

The Record Was Not Timely Served on Respondents.

Copy of the printed record was ordered to be filed and served January 19, 1953, but was not served until January 23, 1953. Thus Rule 38(3) and the Order of this Court were not complied with.

A Federal Question Was Not Timely Raised.

A Federal question first raised in an application to the highest court of a state for a rehearing comes too late to serve as basis for review by the United States Supreme Court, where the state court denied the application without reasons given or reference to the Federal question.

Radio Station WOW, Inc., v. Johnson, 326 U.S. 120, 128, 89 L. Ed. 2092, 2100, 65 S. Ct. 1475;

American Surety Co. v. Baldwin, 287 U.S. 156, 162, 77 L. Ed. 231, 235, 53 S. Ct. 98;

Citizens National Bank v. Durr, 257 U.S. 99, 106, 66 L. Ed. 149, 152, 42 S. Ct. 15;

Godchaux Company v. Estopinal, 251 U.S. 179, 181, 64 L. Ed. 213, 214, 40 S. Ct. 116.

A Federal Question Was Not Involved In The Decision of the Louisiana Supreme Court But Only a Question of State Law Relating to Marriage.

Where the parties have been fully heard in the courts of the state in the regular course of judicial proceedings, a decision involving matters governed by state law does not present a Federal question reviewable by the United States Supreme Court.

Hammerstein v. Superior Court of Cal., 340 U.S. 622, 623, 95 L. Ed. 586, 587, 71 S. Ct. 521;

Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 674, 94 L. Ed. 1194, 1201, 70 S. Ct. 876;

Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.S. 673, 680, 74 L. Ed. 1107, 1113, 50 S. Ct. 451.

Matters affecting the remedy are governed by the law of the forum, and a decision of a state court on a matter of state pleading and practice is therefore not reviewable by the United States Supreme Court.

Central Vermont Ry. Co. v. White, 238 U.S. 507, 509, 59 L. Ed. 1433, 1435, 35 S. Ct. 865.

In addition, the Supreme Court of Louisiana was not apprised of the information available to the witness Sims or to what he would testify if the cause was remanded. Under these circumstances it was also proper

that the Second Supplemental Motion to Remand be overruled. *Sorbe v. Salavignac, 7 Mart. (N.S.) 124.*

Articles 180 and 1082 of the Louisiana Code of Practice cited at page 9 of the petition herein are wholly irrelevant to the matter at hand. *La. R. S. 13:3601* also there referred to relates to "the conduct of civil causes in the district courts." Petitioners are further in error in suggesting that the Supreme Court of Louisiana has jurisdiction of original proceedings in causes appealed to it. The function of that court "is to review the judgments and rulings of inferior courts only on the facts and pleadings presented to them." *Merrill v. Theard, 187 La. 55, 174 So. 107, 108.* It is without jurisdiction and authority to sit as a court of original jurisdiction and try issues there raised for the first time. *Greater New Orleans Homestead Assn. v. Kurner, 171 La. 587, 131 So. 680, 681.*

But even though a Federal question may have been properly and timely raised, where, as here, the state court's decision rests on an adequate and independent non-federal ground, relating to the local law respecting such a question as marriage, the Supreme Court of the United States is without jurisdiction to review and consider correctness of the non-federal ground of the state decision. *Radio Station WOW, Inc., v. Johnson, supra.*

The "guiding rule", it has been said, was laid down in *Lynch v. New York, 293 U.S. 52, 54, 79 L. Ed. 191, 193, 55 S. Ct. 16,* as follows:

"It is essential to the jurisdiction of this Court in reviewing a decision of a court of a State that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the State having jurisdiction but **that its decision of the federal question was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it.** DeSaussure v. Gaillard, 127 U.S. 216, 234, 32 L. Ed. 125, 132, 8 S. Ct. 1053; Johnson v. Risk, 137 U.S. 300, 306, 307, 34 L. Ed. 683, 686, 11 S. Ct. 111; Walter A. Wood Mowing & Reaping Mach. Co. v. Skinner, 139 U.S. 293, 297, 35 L. Ed. 193-197, 11 S. Ct. 528; Eustis v. Bolles, 150 U. S. 361, 366, 367, 37 L. Ed. 1111, 1112, 14 S. Ct. 131; Whitney v. California, 274 U.S. 357, 360, 361, 71 L. Ed. 1095, 1098, 47 S. Ct. 641; Mellon v. O'Neil, 275 U. S. 212, 214, 72 L. Ed. 245, 246, 48 S. Ct. 62." (Emphasis ours).

CONCLUSION.

The decision of the Supreme Court of Louisiana must be accepted herein as controlling on questions of state practice and procedure and of local law respecting the question of marriage. *American Railway Express Co. v. Kentucky, 273 U.S. 269, 272, 71 L. Ed. 639, 641, 47 S. Ct. 353.* Any order or decree herein relating to a further trial and decision of that question would seem, it is submitted,

to be unavailing. The petition for a writ of certiorari should, therefore, be denied.

Respectfully submitted,

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A. K. GOFF,
Ruston, Louisiana;

E. GORDON WEST,
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WM. H. BRONSON,
Shreveport, Louisiana;
Attorneys for Respondents.

CERTIFICATE.

I, Geo. Gunby, of counsel for respondents in the foregoing brief, hereby certify that a copy hereof has been served on W. T. Saye, Esq., attorney for petitioners, by mailing same to him at Longview, Texas.

This day of February, 1953.

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In the

Supreme Court of the United States

OCTOBER TERM, 1952

No. 474

LESLIE D. BLOOM, *et al.*,
Petitioners,

v.

JOHN W. WILLIS, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

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STATEMENT

Respondents omitted any reference to the alternative claim of petitioners to the Marital Fourth. The marriage and date of marriage are both material issues. If the parties were married prior to January 27, 1893, title to the property described in the deed of that date belonged to the community. The same is true as to the property acquired by deed of April 4, 1893. If the marriage was subsequent to date of acquisition, petitioner would be entitled to the Marital Fourth.

All emphasis in this brief is ours unless otherwise stated.

—I—

CONCERNING CLAIM OF UNTIMELY SERVICE OF THE RECORD ON RESPONDENTS

The first reason respondents assign for denying the writ, is untimely service of the printed record. The time for service had been extended to and including January 19, 1953. It was served January 23, two days late as the 19th was a holiday. The delay was caused by a week being consumed in obtaining data from the Clerk of the Louisiana Supreme Court to amend the record to meet a requirement of respondents before their counsel would sign the stipulation agreeing to the parts of the record necessary to print. The stipulation was mailed to the Clerk of this court December 30th and request for deposit of estimated costs was mailed by letter of the Clerk dated January 7th, and deposit sent by return mail. Petitioners asked the Clerk if it would be necessary to petition for additional time, and he answered in the negative. One copy of the printed record was air-mailed to counsel January 20th but was misplaced in the post office in Longview, Texas, and not located and delivered until January 22nd. It was air-mailed by first mail to counsel for respondents and received by him January 23, 1953, two days late. Respondents suffered no harm or inconvenience by reason of the delay, as a complete copy of the record was available to them. They had copies of the stipulation, and printed copies of the petition and all motions, orders and briefs had been delivered to them several days prior to the signing of the stipulation designating the parts of the record to be printed.

— II —

CONCERNING THE CLAIM THAT A FEDERAL QUESTION WAS NOT TIMELY RAISED

Four cases are cited to support this assignment. None of them support it. They are listed on page 6 of Respondent's brief. The second case listed is *American Surety Company v. Baldwin, 297 U. S. 156, 77 L. Ed. 231, 53 S. Ct. 98.* The opinion of the late Mr. Justice Brandeis, in that case, among other things states:

> "The contention that a federal right had been violated rests on the action of the trial court in entering judgment without giving notice and an opportunity to be heard. *The same ground of objection had been raised throughout the proceedings but solely as a matter of state law.* There had been ample opportunity earlier to present the objection as one arising under the Fourteenth Amendment. (Citing cases.) This is not a case where, as in Saunders v. Shaw, 244 U. S. 317, 320, 61 L. Ed. 1163, 1165, 37 S. Ct. 638, *the federal claim arose from the unanticipated disposition of the case at the close of the proceedings in the State Supreme Court.*"

In *Saunders v. Shaw, 244 U. S. 317, 61 L. Ed. 1163, 37 S. Ct. 638,* the opinion was by Mr. Justice Holmes, the great dissenter, who needs no recommendations to this Court. In a unanimous decision this Court stated the rule as follows:

> "Of course ordinarily that would not be enough. But when the act complained of is *the act of the supreme court, done unexpectedly at the end of the proceeding, when the plaintiff in error no longer had any right to*

add to the record, it would leave a serious gap in the remedy for infraction of constitutional rights if the party aggrieved in such a way could not come here. The defendant was not bound to contemplate a decision of the case before his evidence was heard, and therefore was not bound to ask a ruling or to take other precautions in advance. The denial of rights given by the 14th Amendment need not be by legislation. Home Teleph. & Teleg. Co. v. Los Angeles, 227 U. S. 278, 57 L. Ed. 510, 33 Sup. Ct. Rep. 312. *It appears that shortly after the supreme court had declined to entertain the petition for rehearing the plaintiff in error brought the claim of constitutional right to the attention of the chief justice of the state by his assignment of errors. We do not see what more he could have done.*"

Again quoting:

"The intervening defendant thereupon applied for a rehearing, but the court declined to consider the application under its rule that only one rehearing should be granted. He now brings this writ of error and says that he has been deprived of due process of law, contrary to the 14th Amendment, because the case has been decided against him *without his ever having had the proper opportunity to present his evidence.* Technically this is true, for when the trial court ruled that it was not open to the plaintiff to show that his land was not benefited, the defendant was not bound to go on and offer evidence that he contended was inadmissible, in order to rebut the testimony already ruled to be inadmissible in accordance with his view. The chief justice and Mr. Justice O'Niell were of opinion that the case should be remanded to the trial court, we presume upon the ground just stated. *Probably the majority of the supreme court thought that it was so plain on the uncontroverted facts that the case was within the principle of the Myles Salt Co. Case that to remand it would be an empty form,—a mere*

concession to technicality. It may turn out so, but we do not see in the record an absolute warrant for the assumption, and therefore cannot be sure that the defendant's rights are protected without giving him a chance to put his evidence in.

"The question remains whether the writ of error can be maintained. *The record discloses the facts but does not disclose the claim of right under the 14th Amendment until the assignment of errors filed the day before the chief justice of the state court granted this writ.*"

The two cases previously cited furnish all the authority needed.

However, the other authorities cited by respondent will be briefly discussed and some of the recent cases cited, apparently the cases are all in accord.

Godchaux Company v. Estopinal, 251 U. S. 179, 64 L. Ed. 213, 40 S. Ct. 116, relied on by respondents is not in point. It was brought to this court on writ of error to review a decree of the district court of the Parish of St. Benard, Louisiana, and the action of the Supreme Court of Louisiana. The alleged federal question was available to the petitioner when the suit was filed in the district court and throughout the litigation. Of course, it should have been pleaded and urged in the trial court and in all subsequent proceedings in both of the State courts. The question was not raised until petition for rehearing was filed in the State Supreme Court. This court held it was too late, "*unless the court actually entertains the petition and passes on the point.*"

The above case is expressly distinguished in *Great Northern R. Co. v. Sunburst Oil & Refining Co., 287 U. S. 358, 71 L. Ed. 360.*

Additional cases supporting petitioners' contention are listed below:

International Steel & Iron Company v. National Surety Co., 297 U. S. 657, p. 666, 80 L. Ed. 961;

Honeyman v. Hanan, 300 U. S. 14, p. 26, 81 L. Ed. 477;

Great Northern R. Co. v. Sunburst Oil & Refining, 287 U. S. 358, 71 L. Ed. 360.

Respondents also cited *Citizens National Bank v. Durr, 257 U. S. 99, 106 L. Ed. 149, 42 S. Ct. 15,* as supporting their contention that the federal question could not be raised in the petition for a rehearing, but the court held squarely the other way. The petitioners filed in this court a petition for writ of error, and for writ of certiorari. The writ of error was dismissed because not the proper mode of review, but the application for a writ of certiorari was granted and the case affirmed because there was no federal question in the case.

Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U. S. 673, 680, 74 L. Ed. 1107, 1113, 50 S. Ct. 451.

This case also relied on by respondents was on a writ of certiorari to the Supreme Court of the State of Missouri to review a judgment affirming a judgment of the Circuit

Court for Henry County, dismissing a bill filed to enjoin the collection in part of a tax based on an alleged discriminatory assessment. The writ was granted. It was decided June 2, 1930, opinion by the late Justice Brandeis. We quote the following, which shows the basis of the Court's holding:

> "But our decision in the case at bar is not based on the ground that there has been a retrospective denial of the existence of any right or retroactive change in the law of remedies. We are not now concerned with the rights of the plaintiff on the merits, although it may be observed that the plaintiff's claim is one arising under the Federal Constitution, and, consequently, one on which the opinion of the state court is not final; or with the accuracy of the state court's construction of the statute in either the Laclede Land & Improv. Co. case or in the case at bar. Our present concern is solely with the question whether the plaintiff has been accorded due process in the primary sense,—whether it has had an opportunity to present its case and be heard in its support. Undoubtedly, the state court had the power to construe the statute dealing with the state tax commission; and to reexamine and overrule the Laclede Land & Improvement Co. case. Neither of these matters raises a federal question; neither is subject to our review. *But, while it is for the state courts to determine the adjective as well as the substantive law of the state, they, must, in so doing, accord the parties due process of law. Whether acting through its judiciary or through its legislature, a state may not deprive a person of all existing remedies for the enforcement of a right, which the state has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it.* Compare Postal Teleg. Cable Co. v. Newport, 247 U. S. 464, 475, 476, 62 L. Ed. 1215, 1220, 1221, 38 Sup. Ct. Rep. 566."

— III —

THE QUESTION OF PETITIONERS' CONSTITUTIONAL RIGHTS AND FEDERAL JURISDICTION

The following statement is quoted from brief of respondents (page 6):

"Whether failure of the Supreme Court of Louisiana to remand the case for further evidence, consideration, and decision constituted a denial of due process of law to petitioners under the Fourteenth Amendment to the United States Constitution is the only question presented in the petition for certiorari."

The petitioners agree.

The following is also a quotation from respondents' brief (page 6):

"The assertion of rights under the Fourteenth Amendment was first made in application for rehearing in the Supreme Court of Louisiana. No reference was made thereto in denying the rehearing. (R. 122.)

Petitioners also agree with this statement.

With reference to the last statement of respondents, it is submitted, that they could have, with the same frankness, admitted that the sole question presented as stated in their first quotation as being the only issue presented in the petition for certiorari did not arise and was not in the case in any way prior to the decision of the Supreme Court

of Louisiana. It is just as plain from the record that the petitioners' claim, whether good or bad, originated and was brought into existence by that decision; it was born and is the child of that tribunal. Moreover, the Supreme Court of Louisiana is the state agency that is charged by the petitioners with having so exercised its powers, or claimed powers, to deprive them of their constitutional rights.

The next claim of petitioners is that the prohibition of the 14th Amendment of the National Constitution against depriving any person of life, liberty or property without due process of law extends to all actions of the state, whether through its legislative, its executive of its judicial authorities.

As above stated petitioners also claim, and have consistently done so, since this suit was filed, that the infringement of their constitutional rights was the holding of the Louisiana Supreme Court in denying their second motion to remand. The allegations of the motion and the accompanying exhibit show that R. L. Sims, who was a witness for respondents in the trial court, stated that a part of his testimony at the trial was false and that he had previously advised one of the attorneys of respondents that he knew witnesses in Detroit who knew all about the *Rohnert* case. The attorney suggested to him that he knew he had a lot of friends in Rayville and he thought they could get together, after having first found out the witness had not been interviewed by anyone representing the petitioners; that he

then accepted a bribe from the attorney and agreed to stay away from petitioners and not disclose the names of the witnesses or their whereabouts; and that the attorney employed him and gave him a nominal salary, not revealing just what he meant by nominal; paid him $750.00 to appear in court and testify, and the agreement was fully performed on his part. None of the matters alleged in the motion have ever been denied in any way by any one of the respondents or counsel representing them. They have answered in this court, as they did in the state court, offering many technical excuses why they should not be required to answer.

Under the aforesaid statement of facts the petitioners were denied a fair trial by the criminal acts of the respondents and the holding of the Louisiana Supreme Court denying them any relief.

This does not present a case where an attempt has been made to inject a federal question into a case and invoke federal jurisdiction based on the fact that in the course of the trial a witness or a number of witnesses, whichever the case might be, sometime subsequent to the trial repudiated his testimony, in whole or in part, and made statements that he had sworn falsely and perjured himself. Cases of that kind have ordinarily been tried on motion for a new trial in the trial court, and that court after examining the motion and verification thereof, whatever testimony may accompany it, which may be in affidavit form, in open court, or on depositions. The other side can either contest it and offer evidence in opposition or decide that

the motion together with the supporting brief as a matter of law states no grounds for granting a new trial and submit it without offering testimony. In either case the rights of all parties are preserved and the case may proceed accordingly. In such cases the surprise testimony is discovered before appeal has been perfected.

Upon termination, if the state court of last resort decides either way its decisions are final. In cases of that type the same proposition may arise after jurisdiction has passed out of the trial court and the proceedings are handled according to law, and the rules and regulations of the court to which the litigant properly applies for relief. Under some circumstances such matters are handled by motions to reverse and remand based on newly discovered testimony, the method being prescribed by the forum in which it is heard, but in all cases provision is made for some kind of a hearing, and the fact that the court might deny it peremptorily does not mean that the party has been deprived of his day in court.

Moreover, the fact that the court committed error in so holding has nothing to do with a federal question. Many cases are perhaps wrongly decided by all courts, as is evidenced by so many split decisions, and that is recognized as not being of any importance whatever in this matter. We are not talking about that kind of a case. This is a case in which our reasons have been already stated. Upon learning of the occurrence by receipt of the letter from Mr. Sims, petitioners' counsel frankly submitted the letter to counsel for the other side, telling them that unless

he received some kind of an explanation and denial supported by creditable facts, it would be necessary for him to file a motion to remand, because if the statements in the letter were true, it was a clear case of a litigant resorting to criminal action and corruption and starting the machinery calculated to perpetrate a fraud upon the court and at the same time secretly create a situation that would be an insuperable obstruction in the way of the opposing litigant obtaining a fair and impartial trial.

The motion was filed, and as stated in the brief of respondents on page 3, the only statute pertaining to such procedure is *Article 906* of the *Code of Practice of Louisiana* as quoted. While the statute makes no reference to a particular class of cases, it clearly authorizes and even suggests that the proper method would be to file a motion in that court seeking appropriate relief, and that procedure seems to be the recognized and approved form. In any event petitioners have found no case to the contrary and respondents admit that they have found none. It was approved in the case of *Savin v. Savin, La. Sup. Ct., 51 So. 2d 41, decided February 12, 1951.* Apparently there is not now any question in the case concerning procedure.

As above stated, this court should find it unnecessary to look beyond the motions to remand which were filed in the Supreme Court and the supporting affidavits to enable it to decide the only question before it on petition for certiorari. One copy of the entire record is available to the court, as is also the part of the record that was printed, and,

of course, it can examine any part of the entire record that it sees fit, if it believes that it would throw any light on the question of whether or not the writ should be granted.

Respondents have now filed all that they are entitled to file in this case, unless they should find reason to ask leave of the court to file something additional. Petitioners have respondents' final word concerning the subject matter of the 2d Supplemental Motion to Remand, and in the light of what respondents state, we will summarize our views of what is before this court at this time that supports petitioners' claim to have the writ granted, and the case reviewed by this court.

The principal argument offered by respondents is based on the assumption that Sims' statement does not show what he knew, and that the burden of showing what would be revealed by his testimony was on the petitioners and that they failed to meet the burden. Petitioners very seriously doubt if that contention is supported by any authority in actions of this kind, that is, if there ever was another case exactly like it. At any rate, petitioners believe some discussion of the contents of the letter would be beneficial in properly deciding that issue.

The 2nd Supplemental Motion to Remand, accompanying verification, and supporting affidavit, appears in the printed record as follows: The motion on page 94; supporting affidavit of W. T. Saye, page 96; replica of envelope in which the letter of R. L. Sims to W. T. Saye was received, page 98; and letter of R. L. Sims to W. T. Saye

dated August 1, 1951, signed by R. L. Sims, page 99, and the letter of W. T. Saye to R. L. Sims in reply dated August 9, 1951, page 100.

Attention is first directed to paragraph No. 3 of the Motion to Remand. It will be noted that in subdivision (c), petitioners had the following to say concerning what the letter contained about the issue of marriage:

> "(c) The statements contained in said letter, if true, strongly support the contention of Plaintiffs-Appellants that the true facts, not only concerning the marriage relationship of Frederick and Flora Rohnert, but also other material issues in the case were concealed and that the Defendants-Appellees knowingly and for the purpose of concealing and suppressing the facts, failed and refused to call witnesses who were in a position to testify to such facts and that they were not called because the Defendants-Appellees knew that their testimony would be unfavorable to Defendants'-Appellees' contentions."

As no response or denial of any af the facts set forth in the motion or the exhibits to the motion, and as the motion is verified by affidavit, admissible in evidence unless the genuineness of the signature or authenticity is questioned and raised at the time. For the first time in this entire proceeding that issue has been suddenly raised in respondents' brief. Under the circumstances under which this letter was filed and the action of counsel in interviewing opposing counsel prior to the filing, and discussing it with him, and respondents having at no time questioned the genuineness or authenticity of the letter, they are es-

topped to do so at this time. In addition, no action by the Supreme Court of Louisiana is based on any objection to the manner of procedure, and that court considered all the motions to remand and the accompanying exhibits as being properly before it, so that matter is foreclosed.

The law of Louisiana pertaining to public bribery is first quoted below, followed by the penalties prescribed for perjury:

"P18—Public Bribery—

"Public bribery is the giving or offering to give, directly or indirectly, anything of apparent or prospective value to any of the following persons, with the intent to influence his conduct in relation to his position, employment or duty:

(1) Public Officer or Public Employee; or

(2) Election Official at any general, primary, or special election; or

(3) Grand or Petit Juror; or

(4) *Witness, or person about to be called as a witness, upon a trial or other proceeding before any court, board, or officer authorized to hear evidence or to take testimony.*

"The acceptance of, or offer to accept, directly or indirectly, anything of apparent present or prospective value, under such circumstances, by any of the above named persons, shall also constitute public bribery.

"Whoever commits the crime of public bribery shall be fined not more than one thousand dollars, or imprisoned, with or without hard labor, for not more than five years, or both."

Louisiana Revised Statutes, Art. 14, par. 118;

West's Louisiana Statutes Annotated, Revised Statutes of 1950, Vol. 9, pages 588-589;

Act No. 43, Acts of 1942 Session of the Legislature of the State of Louisiana, as amended down to 1950.

Art. 14, par. 123, provides that a person committing perjury shall be fined not less than $1,000.00 or not more than five years imprisonment at hard labor, or both.

West's Louisiana Statutes Annotated, Vol. 9, pages 603-604.

The record, therefore, clearly discloses the undenied fact that the respondents acting through counsel, deliberately perjured a witness for the purpose of inducing him to swear falsely and suppress testimony that counsel itself stated would "play hell with us," which can have no meaning other than that it would destroy their defense of this lawsuit. No further words need be wasted arguing this.

Petitioners are of the opinion that the materiality of the contents of the letter is admitted. Sims advised counsel for respondents that he knew people in Detroit who knew all about it, undoubtedly referring to the lawsuit and the evidence to be used, as that was the only subject under discussion. Counsel replied telling the witness to keep his damn mouth shut, that these people were not the ones they wanted. If this does not show on its face a brazen act of colluding and tampering with a witness, bribing him, fabricating testimony and conspiring to suppress the produc-

tion of testimony of witnesses who knew the truth, and thereby defeat the claim of petitioners without due process of law by preventing their obtaining judgment based on anything resembling a fair hearing, we cannot choose words that would more clearly show what their purpose was and which would more clearly show that counsel knew the exact nature of the testimony that he was colluding and conspiring to suppress and was willing to pay to see that it was suppressed.

We wonder if anybody seriously expects a court to believe that men of the learning and intelligence of counsel for respondents are sincere in their argument that this evidence was immaterial. The all important question arises and is unanswered here: What were they paying for and why were they flirting with the risks involved in, and the consequential penalties of committing the various offenses that could result from their conduct? It is inconceivable that this was all done as a mere gesture of some kind. Of course, as stated, there seems to be no way within the powers of the petitioners to obtain an expression, one way or the other, from any of the respondents or their counsel as to why they have not long, long ago denied these charges if Sims was not telling the truth, and frankly, if there was not something wrong, it would have been denied long ago. It is one of those things that does not suggest raising any number of technical reasons, if they were in position to show Sims was not telling the truth. Common honesty and the slightest inclination toward fair dealing would dictate not only a denial, but a complete submission of whatever

proof that might be necessary to show that they were not guilty of what he charges.

We have nothing further to say concerning the materiality of this letter, but we would like to very strongly urge that even if it be conceded that the evidence referred to in the letter had no bearing whatever on the case, it would still have no bearing on the question of a fair trial, and whether or not the writ of petitioners should be granted. It is so well established that fraud vitiates everything into which it enters that in the state of the record, there is no view that can be taken justifiably other than that no court is justified in believing or giving effect to one single word of evidence that was offered by respondents in this entire case. Frankly, if they are guilty of the charges made by Sims, it is obvious that there is no limit to the extent that they would go to defeat justice, and litigants are entitled to have their constitutional rights determined in a wholly different atmosphere from this. No hesitation whatever should be shown in requiring that the case be put back like it was before the proceedings started. In short, it should be expunged from the records.

There is one other matter that so far has gone unnoticed; that is, that the question of the binding effect of a state court governing the applicable laws of the state in which the court is located. In this case, the only question of Louisiana law that has been decided was not even in issue. That question is stated under respondents' heading "Statement of the Case" in which it is stated that the only question passed on by the trial and appellate courts of Louisiana

related to whether or not a marriage had been entered into which would be recognized by the laws and courts of Louisiana. The opinion of the Louisiana Supreme Court had this to say on the subject: "With respect to this paramount issue of marriage, all parties agree that the following observations contained in the brief of appellees' counsel are correct (PR 106):

> "A marriage such as it alleged upon in these proceedings is not recognized by our laws, but, out of comity, the Courts of this State will give effect to any marriage valid under the laws of the state where the parties reside. Succession of Marinoni, 177 La. 592, 148 So. 888. Michigan recognized common-law marriage, and since Flora Alward and Frederick Rohnert were both resident of that State, we must look to the laws thereof in order to determine if the marriage existed."

So as a matter of fact there was no issue in the case based on Louisiana law. The question of marriage admittedly depends upon the laws of Michigan, and the court and counsel for both sides all agree that the court decided nothing except that issue. Therefore, the question of this court interfering with the decision of the courts of Louisiana in respect to Louisiana law is not involved. In our opinion, we can show by Michigan decisions and also by decisions of this court that it did not correctly construe and apply the Michigan law, but no purpose would be served by doing so in this proceeding at this time.

Another matter that has been argued somewhat thoughtlessly is the question of fact finding by the Louisiana court.

A finding of a court on an undisputed fact is a law question. Counsel for respondents say that the Supreme Court of Louisiana having held that the affidavits and other evidence offered in support of all three motions to remand were cumulative and petitioners are bound by that holding. From the language used it does not appear from the opinion that this statement was intended to apply to the 2nd Supplemental Motion, which pertains to the Sims letter. The court said that the testimony in the main was purely cumulative and if introduced could not change the result. That statement could not be truthfully applied to the Sims transaction, because the court could not know whether or not it would change the result. The fact that its contents had not been denied should have changed the result at that moment, but at any rate the fact finding is not very strong. The court (PR 109) made the statement that there was no evidence whatever in the record having any tendency to indicate the existence of the relationship of marriage prior to the year 1923. Without arguing that proposition here, and showing that there was much stronger evidence offered by defendants themselves, to support a marriage relationship existing prior to 1923 than subsequent to 1923, the point we wish to make is that if the statement of the court be accepted as true, then it follows that the affidavits supporting petitioners' 1st Motion to Remand could not possibly be cumulative in any respect. Five of them state facts we believe most courts would hold had much more than a mere tendency to establish a marriage relationship under the common law, so the court itself destroyed the legal ef-

fect of its holding about the proposed evidence being cumulative.

Respondents' suggestion that petitioners' counsel had the opportunity to question Witness Sims concerning the marriage on his cross examination but neglected to do so, is easily answered. He was not questioned about the marriage on direct examination. The fact that counsel for petitioners would have made him his witness and been bound by his testimony is a sufficient answer.

Concerning the contention that the State Supreme Court did not pass on the federal question; it was squarely raised in the petition for a rehearing, and the court either decided it against petitioners or evade it. In either event, the case was ripe for appeal or application for writ.

The real party-plaintiff in interest was the woman claiming to be the widow of Frederick Rohnert, deceased. She had been a duly adjudged mental incompetent since the year 1932, with the exception of a little over two years from the latter part of 1938 to her reincarceration in 1940. During the latter period she was virtually penniless, unable to work, and lived on what meagre funds she received from the Welfare Department. Since this action was instituted by her guardians until her death while the case was pending in the Louisiana Supreme Court, she was, of course, a ward of the court, and entitled to its protection, and that regardless of any dereliction on the part of counsel. It is hardly necessary to mention that counsel with no available client to assist him or confer with in a case involving evidence over such a long period of time was indeed

seriously handicapped from the start. This is particularly true in a city like Detroit which has undergone so many changes during that period of time, causing shifts in the population. Not a living relative that had very much information or knew anything about this woman's past was available.

There is one statement that we will add, and that is that of all the witnesses who were produced and who testified by deposition or in court for either the plaintiff or defendant, not one testified that they had ever known or heard of this woman committing an immoral act and not one testified that she was ever known to have kept company with any man other than Frederick Rohnert, or that they ever knew of Frederick Rohnert going with or being with any other woman except some of his lady relatives, who occasionally visited the store. To say the least, it is unusual for a man to have either a mistress, concubine or harlot for that period of time and her live through it without anyone being able to besmirch her character, unless it was the man she claimed was her husband. These are facts that should be taken into consideration in deciding any lawsuit; as it shows the equality of opportunity to present all the true facts to the court.

It is perhaps not necessary to cite any further cases on the constitutional questions involved, but the following cases are in line with those already cited by petitioners:

Annotation, 42 L. Ed. 865;

Snyder v. Mass., 291 U. S. 97, 78 L. Ed. 674;

Powell v. Alabama, 287 U. S. 45, 77 L. Ed. 158;

Blackmer v. U. S., 284 U. S. 421, 76 L. Ed. 375;

L. & N. v. Western Union, 234 U. S. 369, 58 L. Ed. 1356.

Respectfully submitted,

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W. T. SAYE.